APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 78-1175

HATZLACHH SUPPLY CO., INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 26, 1979
CERTIORARI GRANTED MAY 14, 1979

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Case No. 120-76

HATZLACHH SUPPLY CO., INC.

v.

UNITED STATES OF AMERICA

May 17, 1976 —	Filing fee of $10 paid by plaintiff.
	* * *
June 15, 1976 —	Defendant's answer filed.
	* * *
October 31, 1977 —	Defendant's motion for summary judgment filed.
	* * *
February 21, 1978 —	Plaintiffs opposition to defendant's motion for summary judgment filed.
	* * *
July 14, 1978 —	Petition dismissed. Opinion by Judge Kunzig.
	* * *
August 2, 1978 —	Plaintiff's motion for rehearing and suggestion for rehearing en banc filed.
	* * *
August 11, 1978 —	Defendant's response to plaintiff's motion for rehearing.
	* * *
September 29, 1978—	Court entered order denying plaintiff's motion for rehearing.

UNITED STATES COURT OF CLAIMS

HATZLACHH SUPPLY CO., INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

PETITION
No. 120-76

COMPLAINT FOR DAMAGES

The Plaintiff, HATZLACHH SUPPLY CO., INC., by its attorney, MARK LANDESMAN, complaining of the defendant herein, alleges as follows:

FOR A FIRST CAUSE OF ACTION

1. Plaintiff was at all the times hereinafter mentioned a corporation organized under the laws of the State of New York with its present principal office and place of business at 928 Broadway in the City of New York.

2. This action is brought under 28 USC sec 1491 as hereinafter more fully appears.

3. Plaintiff was at all times hereinafter mentioned engaged in the business of importing and merchandising cameras, films, flash bulbs, razor blades and various other merchandise.

4. On or about March 17, 1970, a container of merchandise numbered 57733, containing films, camera kits and flash bulbs, arriving from Hamburg via Bremen, Germany and consigned to and owned by Plaintiff, herein, was seized at the Sealand Terminal, Elizabeth, New Jersey, by the Bureau of Customs, an agency of the Defendant UNITED STATES OF AMERICA and was subsequently and belatedly referenced as Seizure No. 24443.

5. On or about April 3, 1970 two containers of merchandise, numbered 61934 and 40556 respectively, con-

taining films, flash bulbs, razor blades, electric shavers, cassettes, cartridges, tape recorders and various other items, arriving from Hamburg via Bremen, Germany and consigned to and owned by Plaintiff herein, were seized at the Sealand Terminal, Elizabeth, New Jersey by the U.S. Bureau of Customs and were subsequently and belatedly referenced as Seizure No. 25172.

6. On or about October 13, 1970, the U.S. Bureau of Customs offered to remit the aforementioned seizures in return for a penalty of $40,000 in response to an administrative petition filed by Plaintiff with the U.S. Department of the Treasury.

7. As soon thereafter as possible Plaintiff did pay $40,000 to the U.S. Bureau of Customs in order to obtain the return of his seized merchandise valued at $577,230.93.

8. While still in the custody and possession of the U.S. Bureau of Customs, various merchandise from both of the above mentioned seizures totalling $165,220.50 in value was lost or stolen.

9. As a result thereof, by its failure to return to Plaintiff the total amount of goods seized from it, as it agreed to do, the Defendant UNITED STATES OF AMERICA through its agents and servants of the Bureau of Customs, breached the contract of bailment.

10. As a result of the above, Plaintiff was caused to suffer damage in the amount of $165.220.50.

FOR A SECOND CAUSE OF ACTION

11. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "9" as if more fully set forth herein.

12. Said seizures were capricious, arbitrary, unreasonable, unlawful and not sanctioned nor colored by the intended purpose of the statutes underlying such seizures.

13. That although said seizures actually occurred on March 17, 1970 and April 3, 1970 respectively Plaintiff was first given official notice thereof on May 28, 1970 and June 3, 1970, respectively.

14. That while Plaintiff filed the aforesaid administrative petitions to the Treasury Department almost immediately thereafter and fully cooperated with the government throughout, the Bureau of Customs, nevertheless, first advised Plaintiff on October 13, 1970 that the forfeitures would be remitted upon payment of a $40,000 penalty.

15. That said actions on the part of the Bureau of Customs constituted an unreasonable detainer of Plaintiff's property and deprivation without due process.

16. That the aforesaid actions on the part of the Bureau of Customs deprived Plaintiff of a large percentage of his working capital for an unreasonable amount of time.

17. That the losses and pilferage occasioned by the handling of the Bureau of Customs in breach of the contract of bailment resulted in the Plaintiff being deprived of a large percentage of its working capital.

18. That all of the aforesaid caused Plaintiff to lose face and good will with its customers and to lose numerous contracts all to the detriment of its business.

19. That by reason of the aforesaid Plaintiff was caused to lose business and suffer damages in the amount of $2,000.000.

WHEREFORE, Plaintiff, HATZLACHH SUPPLY CO., INC. respectfully requests relief against the Defendant, UNITED STATES OF AMERICA in the amount of

a. $165,220.50 on the first cause of action.

and

b. $2,000,000 on the second cause of action, together with interest and costs of this action and for such and further relief as to this Court may seem just and proper.

/s/ Mark Landesman

MARK LANDESMAN
ATTORNEY FOR PLAINTIFF

* * * * *

UNITED STATES COURT OF CLAIMS

No. 120-76

[Caption omitted]

DEFENDANT'S ANSWER

For its answer to plaintiff's petition defendant admits, denies and alleges as follows:

1. Denies for lack of knowledge or information sufficient to form a belief as to the truth thereof.

2. The allegations of paragraph 2 constitute conclusion of law to which no response is required, but to the extent that said allegations may be deemed to be allegations of material fact, they are denied.

3. Denies for lack of knowledge or information sufficient to form a belief as to the truth thereof.

4. Admits the allegation of paragraph 4 except denies that the seizure was "belatedly" referenced and avers that the date of seizure was March 24, 1970.

5. Admits the allegations of paragraph 5 except denies the seizures were "belatedly" referenced and avers that the date of seizure was April 6, 1970.

6. Admits the allegations of paragraph 6.

7. Admits that plaintiff paid $40,000 to the United States Customs Service (not the "U.S. Bureau of Customs") in order to obtain the return of the seized merchandise; denies the remaining allegations of paragraph or for lack of knowledge or information sufficient to form a belief as to the truth thereof.

8. Admits that some merchandise was lost from the first seizure. Denies the remaining allegations for lack of knowledge or information sufficient to form a belief as to the truth thereof.

9. Denies that any contract of bailment was created by the seizures; further denies that defendant breached any sort of contract in connection with the seizures.

10. Denies the allegations of paragraph 10 to the extent it may be deemed to allege that defendant breached a contract. Denies the allegation of the amount of damages for lack of knowledge or information sufficient to form a belief as to the truth thereof.

11. Defendant hereby repeats and incorporates by reference each and every answer to paragraph 1 through 9 of the petition as if fully set forth.

12. Denies the allegations of paragraph 12.

13. Admits that the notices of seizure were given on the dates alleged, but avers that the actual dates of seizure were March 24 and April 6, 1970.

14. Admits the allegation that plaintiff was notified on October 13, 1970 that the forfeitures would be remitted upon payment of a $40,000 penalty. The remaining allegations as to the immediacy of plaintiff's filing of administrative petitions and the extent of its cooperation with the Government are mere conclusions of the pleader not requiring an answer; to the extent they may be deemed allegations of material facts, they are denied.

15-17. Denies the allegations of paragraphs 15-17.

18. Denies the allegations of paragraph 18 to the effect that plaintiff lost face and good will and contracts for lack of knowledge or information sufficient to form a belief as to the truth thereof. Denies the allegation that any such losses were caused by actions of the Government.

19. Denies the allegations of paragraph 19 to the effect that plaintiff suffered damages in the amount of $2,000,000 for lack of knowledge or information sufficient to form a belief as to the truth thereof. Denies the allegation that defendant is responsible for any such damages.

20. Except as herein admitted, denied or qualified, denies all allegations of material fact contained in the petition.

FIRST AFFIRMATIVE DEFENSE

21. Plaintiff fails to allege the essential elements of a contract with the United States; accordingly, the petition fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

22. To the extent plaintiff attempts to state a claim based upon an illegal seizure, said claim sounds in tort and is therefore outside the jurisdiction of this court.

THIRD AFFIRMATIVE DEFENSE

23. Plaintiff's claims accrued at the latest on or before October 6, 1970, the date upon which the forfeitures were remitted. Plaintiff's petition herein was not filed until March 17, 1976, almost six years from the original seizure. Because of this unreasonable delay, defendant has been severely prejudiced in its ability to obtain evidence relating to the person or persons responsible for the losses in question. Accordingly, plaintiff's claim is barred by the doctrine of laches, or at the least, plaintiff should be held to have a heavier burden of proof.

WHEREFORE, defendant demands that plaintiff's petition be dismissed and that defendant be granted such other and further relief as may be just and proper.

REX E. LEE
Assistant Attorney General
Civil Division

GEORGE M. BEASLEY, III
Attorney, Civil Division
Department of Justice

UNITED STATES COURT OF CLAIMS

No. 120-76

[Caption omitted]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * * * *

STATEMENT OF FACTS

This case arises out of the seizure in 1970 by the United States Customs Service (then known as the Bureau of Customs) of the contents of three cargo containers of miscellaneous merchandise being imported by plaintiff from Germany (Ex. A, p. 1). The first one-container shipment was seized in March 1970 for violation of 19 U.S.C. §1592, on the grounds that plaintiff had attempted to introduce into the commerce of the United States merchandise by means of false statements as to its value and quantity in an immediate delivery application and that the manifest and bill of lading misdescribed the merchandise. (Id. p. 3). The second shipment of two containers was seized in April 1970 for violation of the same statute, on the grounds that plaintiff had attempted to introduce into the commerce of the United States imported merchandise by means of an altered foreign-trade zone application relating to the description of the merchandise and its value, and that the manifest and bill of lading contained false and misleading descriptions of the contents of the containers. (Ibid.) Accordingly, under the provisions of §1592, the contents of the containers were declared forfeited to the United States.

Plaintiff, through counsel, filed a petition pursuant to 19 U.S.C. §1618 for remission of the forfeitures (Ex. B). Such statute allows the Secretary of the Treasury to remit a forfeiture if he finds that it was incurred without willful

negligence or intent to defraud or violate the law, or if he finds that there are mitigating circumstances justifying the remission. If so, such remission may be done on such terms and conditions as he deems reasonable and just. The functions of the Secretary under this statute had been delegated to the Commissioner of Customs and on or about October 13, 1970, the Commmissioner offered to remit the seizures in return for payment by plaintiff of a penalty of $40,000 (Pet., §. 6.) Thereafter, plaintiff paid such penalty and the merchandise from the containers which was in the possesion of Customs was released to plaintiff. (Pet., § 7.)

On March 17, 1976, only one day short of six years from the time plaintiff attempted to enter the shipment covered by the first seizure (Ex. A, p. 1), plaintiff filed this suit, contending that during the time the containers were in the "custody and possession" of Customs,[1] various items of merchandise from both seizures was "lost or stolen" (Pet., §8). As a result, plaintiff seeks $165,220.50 for the value of the lost or stolen goods and $2,000,000 in consequential damages.

* * * * *

[1]Defendant denies that the merchandise was lost or stolen while in the custody or possession of Customs. On information and belief, it contends that any property which disappeared did so while the containers and their contents were in the sole custody or possession of plaintiff's agent, the shipping company. Such company, Sea-Land Service, Inc., has been notified under Rule 41 to assert any interest it may have in this suit, and has appeared as a third-party defendant. Due to the long delay by plaintiff in filing this suit, the facts concerning the pilferage or loss from the shipments are a matter of dispute. Because the Court clearly lacks jurisdiction over plaintiff's alleged contract action against the Government, however, it is not necessary to go into these disputed issues.

EXHIBIT A

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ALLAN H. KAMNITZ
HARVEY A. ISAACS
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SAMUEL T. SIEGEL
1882-1948
SIDNEY MANDELL
1889-1969

June 5, 1970

Regional Commissioner of Customs
United States Custom House
Bowling Green
New York, New York 10004

Attention: I. D. Krawet, Assistant Director
Claims and Penalties Division

Re: Hatzlachh Supply Co., Inc.
Seizure No. 24443

Dear Sir:

Petition is herewith made under the provisions of 19 U.S.C., §1618 for relief from the forfeiture declared by your office in your seizure and penalty notice dated May 28, 1970 in the referenced matter. The circumstances surrounding the attempted importation of the merchandise, which we believe justify the grant of relief, are as follows:

On or about March 18, 1970 the petitioner attempted to obtain the release of a container containing various merchandise which had been landed from the S.S. Portoria at the Sealand Terminal in Port Elizabeth, New Jersey, several days earlier. It was intended that the merchandise be released under the immediate delivery procedures provided in 19 U.S.C. §1448(b) and Customs Regulations §8.59. Pursuant thereto Beacon Shipping Co., Inc., a licensed customhouse broker located at 30 Vesey Street, New York, New York, was provided with the necessary documentation and instructed to prepare a proper application and special permit for immediate delivery.

The petitioner has been informed that an application was prepared as requested, except that the merchandise description, taken from the bill of lading rather than the invoices, was erroneous. The petitioner has no personal knowledge of the reason the merchandise description on the bill of lading did not conform to the invoice description. But the petitioner states unequivocally that he in no way contributed, either actively or passively, in the erroneous description, and that his only instruction to the broker was to prepare a proper application.

Upon presentation at the Sealand Terminal the customs officials refused to permit entry because of the obvious and apparent discrepancy between the merchandise description on the immediate delivery application and permit and the invoice. The papers were returned by the truckman to the customhouse broker's office for correction.

The petitioner has been informed that the documents prepared by the broker in order to rectify the problems were correct to the extent that the merchandise descriptions were the same on the application and permit form and on the invoices. However, and apparently this is the purported basis for the seizure although ex post facto, the broker's clerk who prepared the application and permit committed an error in calculating the nominal value of the shipment and omitted two of the four invoices covering the merchandise which had been consolidated into a single container shipment. The error in calculating arose because, although the currency of three of the four invoices was United States dollars, the clerk, a Mr. Thomas Ramono, treated all four invoices as if they were stated in Deutsche marks and divided the total of the whole by four. This factor was selected because it represents the conversion factor between Deutsche marks and United States dollars.

The second error in connection with this transaction occurred because the broker thought that the pro-forma invoice which had been prepared to cover two of the invoices duplicated one of the invoices actually submitted.

The seizure poses several problems in the application of the mandate of 19 U.S.C. §1592, the resolution of any or all of which, we believe, would justify the grant of immediate substantial relief from the burdens imposed thereby if not outright cancellation of the case. Among the factors to be considered are:

(1) The erroneous documentation did not constitute an entrance, introduction, or attempt to enter or introduce merchandise into the commerce of the United States.

(2) The documentation was erroneous on its face, thereby obviating the inference that errors beneficial to the importer were an attempt at nondisclosure of relevant information.

(3) The petitioner was prevented under color of law from making a formal entry because its documents were seized.

(4) The merchandise was not reduced to seizure and notice given as required by law until May 28, 1970, although it had been detained under color of law since March 17, 1970. The hardship suffered by the petitioner as a result of this unlawful procedure renders illusory the benefits Congress intended to afford under 19 U.S.C. §1618.

(5) Failure to mark merchandise with the country of origin is not a violation of 19 U.S.C. §1592 and does not justify a seizure.

(6) The Government's inventory is erroneous.

(7) The quantity of merchandise actually landed is *less* than that invoiced in every material respect.

(8) The invoiced values of the merchandise exceed the appraised foreign value thereof even though the appraised foreign unit values are higher in most cases than the contract prices as stated on the invoices.

(9) This case has been investigated at length, in the United States and abroad. There is not a scintilla of evidence of intent to commit any act proscribed by 19 U.S.C. §1592,

(10) Throughout its existence Hatzlachh Supply Co.,

Inc., the petitioner herein, has never been found in violation of 19 U.S.C. §1592.

(11) Although threatened with criminal prosecution the petitioner has cooperated with the Government to the fullest extent compatible with its constitutional rights, and has requested that persons outside the United States extend their fullest cooperation, to the end that this case be rapidly disposed of.

The power vested in the authorities by 19 U.S.C. §1592 to seize merchandise has been held to be lawful by the courts on numerous occasions. It is not the naked existence of this power which is challenged by this petition, but its exercise in a manner which is arbitrary and deprives the importer of the opportunity to make a correct and lawful entry in the first instance. Simply put, an application and special permit for immediate delivery is not an entry. Entry is a specific statutory concept implemented by a specific procedure, and is an act which the importer usually must perform in order to complete a lawful importation. As the use of the term entry does not suffice to cover withdrawal from warehouse for consumption, however, the language of "introduction into the commerce of the United States" can be seen to amply accomplish this purpose. Unfortunately, the Bureau has chosen in this case to expand the reach of the statute beyond its plain language and clear purpose. It has taken a document of no substantial legal significance, which is required by law to be superseded with proper, legal documentation, and sought to convert it into an attempt to perform a specifically defined legal act, the entry or introduction of merchandise into the commerce of the United States.

The invalidity and uselessness of this procedure can be demonstrated in two ways. First, if on their face, the papers were faulty the Government had available to itself the very simple expedient of refusing to grant the permit for immediate delivery; second, in any case where the only incorrect document is an erroneous application for im-

mediate delivery and the papers are otherwise correct and make full disclosure in all respects, we believe it would be so clearly inequitable and contrary to the intention of the statute that the Government should not institute a penalty proceeding.

It seems to have been lost to view in this case that the power of customs personnel to seize without process is an extraordinary and unique power which should not be invoked unless it is necessary to prevent dispersal of the goods. It is never necessary to seize where the merchandise is in Government custody and the Government may lawfully detain it in its custody without a seizure. The importer has no right to obtain a permit for the release of the goods if his papers are not in order. In the absence of palpable proof of intent to deprive the Government of revenue or otherwise evade the customs laws, which behavior is in itself criminal, a seizure which takes place while the merchandise is in the custody of the Government and before the importer has completed his formal entry of the goods is premature and constitutionally invalid because it is violative of due process of law. We submit that the seizure in the case to which this petition is addressed was and remains premature and defective.

The petitioner is entitled by rule of law to the presumption that its acts are lawful. So long as its acts do not rule out the possibility that the law will be observed it must be deemed that the law would have been observed. This implies that all imported merchandise would have been declared at its appropriate entered value and proper estimated duties would have been deposited. Assuming these acts had taken place it is incredulous that the Government, to vindicate a tehcnicality, would institute a penalty proceeding, and we have sufficient confidence in the Government to believe that no such case exists. The petitioner is entitled to the assumption these acts would have taken place if it had been given the opportunity and it is submitted that this seizure is accordingly invalid.

You state in your letter of May 28th that the seizure of the petitioner's goods took place on March 17, 1970. Notice of the seizure was not issued for eleven weeks until May 28, 1970. From the available information it appears that most of the interim period was spent in an effort to determine whether the seizure should have taken place. After extended investigation which apparently produced nothing the file was referred to the United States Attorney for the District of New Jersey who declined prosecution. Not satisfied with the original inventory of the goods, a reinventory was ordered. (The petitioner maintains that the inventory is still incorrect and requests the opportunity to examine the goods itself.) During this entire period of time the petitioner has been deprived of the use of its merchandise without having been informed that it was accused of any specific violation of law. Furthermore, the statement of appraisement released to the petitioner's attorneys indicates that the quantities which survived the opening of the container in a public place accessible to strangers on the pier were smaller than the quantities stated on the invoices.

The allegation that the documents understated the values and quantities of the merchandise is incorrect. Invoices covering every iota of the merchandise were submitted to customs and rejected. In fact, the invoices which were erroneously omitted on the occasion of the second tender of documents had been submitted earlier. Understatement implies a consistent pattern, one would think, and certainly there is no consistent pattern here. In every instance of which the Government could conceivably complain in this case the documentation was plainly and clearly erroneous, a situation hardly compatible with an underevaluation situation of any kind, intentional or otherwise.

The petitioner takes issue with some of the merchandise totals reported in the Government's inventory, as follows:

(a) PX-135-20 Plus X Pan film is packed in cartons of 30 cans of ten rolls each. There was simply no way for five extra rolls of film to have found their way into the shipment.

(b) The petitioner doubts the accuracy of the inventory of camera kits as only 2900 were shipped and paid for and not 2925.

(c) Unless some flashcubes disappeared during the examination on the pier the inventory is too low, as only one carton was short-shipped and the quantity missing exceeds the contents of a single carton.

(d) The inventory shows an overage of 500 rolls of CX 620 size film and a shortage of 500 rolls of CX 120 size film. It would be interesting to know what difference it could possibly make even if the Government's inventory figure is correct, as the two kinds of film are identical in price and every other respect except spool size.

(e) The only significant discrepancy between the invoice totals and the Government's inventory in fact, is one which, if the importer's figures are accepted, works to the importer's detriment. Taking an average price of 82.5¢ per roll of CX 126-20 film the value of the 57,400 rolls invoiced but not inventoried is $47,355. At an average price of 68¢ per roll of CX 126-12 film (the films differ only in that the cheaper film is 40% smaller in length) the value of the purported overage of 50,181 rolls is only $34,123.08. The petitioner believes that actually the inventory is incorrect in that approximately 50,000 rolls of the higher-priced CX 126-20 film were listed on the inventory as cheaper priced CX 126-12 size film. The petitioner has no explanation for the shortage of 7219 rolls of CX 126-20 film which were invoiced, shipped and presumably landed. However, as the only alternative to the conclusion that these goods were not landed is that they disappeared while in customs custody, it must be assumed they were not landed.

This petition has previously adverted to the fact that the petitioner has extended to the Government every possible effort at cooperation within the circumstances. It has done so not only out of the conviction of its innocence of any wrongdoing, but to precipitate the disposition of this case in order that the seized merchandise may be removed from

limbo. The petitioner's concern in this regard derives from the fact that film is a dated commodity which must be in the hands of the storekeeper well in advance of its expiration date to be salable. That time has already passed.

The petitioner has as of now sustained serious financial loss as a result of this seizure. It is entitled to a prompt disposition of this case by the cancellation of the forfeiture claim and the immediate restoration of the goods.

HATZLACHH SUPPLY CO., INC.

By /s/ Morris Broker
Morris Broker, President

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Joseph S. Kaplan
of Counsel

EXHIBIT B

June 26, 1970

Regional Commissioner of Customs
United States Custom House
Bowling Green
New York, New York 10004

Attention: I.D. Krawet, Assistant Director
Claims and Penalties Division

Re: Hatzlachh Supply Co., Inc.
Seizure No. 25172 of April 3, 1970

Dear Sir:

Petition is herewith made for cancellation of the forfeiture incurred as a result of the referenced seizure of the petitioner's merchandise.

As stated in your letter of June 3, 1970 giving notice of the seizure and forfeiture, this case arises from the seizure of two shipping containers numbered 61934 and 40556 at the Sealand Terminal in Port Elizabeth, New Jersey. At the time of seizure the containers were in customs custody and a permit had been obtained by the petitioner for their removal to the foreign trade zone as non-privileged merchandise. The original application for a foreign trade zone entry permit filed at the Customshouse in fact failed to specify that the shipment included film, and in fact stated that the value of the goods in the containers was $60,000. The permit presented to the customs inspector at the terminal, however, had been corrected to include the film among the merchandise described and the value had been corrected to $160,000.

The issue presented by this case is whether the foregoing facts constitute a violation of 19 U.S.C. §1592. That section prohibits and penalizes the making of any false statement or declaration by certain designated persons in connection

with the entry or attempted entry or introduction or attempted introduction of merchandise into the commerce of the United States. It is claimed in behalf of the petitioner that no such event occurred, and that the seizure under the authority of Section 1592 was improvident and illegal.

Removal of merchandise to the foreign trade zone is the very opposition of its introduction into United States commerce. As that act constitutes a withholding of the merchandise from domestic commerce, the statute provides that merchandise may be brought into the zone "without being subject to the customs laws of the United States" except as elsewhere provided in Chapter 1A of Title 19, United States Code Sec. 19 U.S.C. §81c. Notably, Chapter 1A makes no mention whatsoever of §1592 and it is therefore not applicable to actions taken pursuant to the Free Trade Zones Act, 19 U.S.C. §§ 81a to 81u. A foreign trade zone application to admit merchandise is a document existing under the authority of the Free Trade Zones Act. As Chapter 1A of Title 19 does not provide that such a document shall be governed by the provisions of 19 U.S.C. §1592, it is not so governed, and is in fact exempted from such coverage.

The reasons for the distinction in treatment between documents pertaining to the introduction of merchandise into the United States commerce and those which do not, are apparent upon the most cursory examination. Merchandise introduced into United States commerce is subject to the payment of duty, and merchandise sent to the foreign trade zone is not. Merchandise subject to the payment of duty must be documented in a manner consistent with the necessity to appraise and liquidate, while it is sufficient that non-privileged foreign merchandise sent to the foreign trade zone be identified and right to possession established. If merchandise is removed from the foreign trade zone for entry into United States commerce it is subject to the same standards of documentary propriety as any

other importation. We wish to emphasize, however, that while analysis and speculation concerning the rationale for statutory dictates may be intersting, it is the plain language of the statute exempting foreign trade zone movements from the application of the customs laws which controls.

We are not suggesting that the Bureau of Customs has no interest in foreign trade zone operations. Its interest is explicitly recognized in the mandate to the Secretary of the Treasury to prepare regulations concerning the zone, and that to the Zone Board to cooperate with the Bureau. But the Bureau has no authority to prevent the movement of merchandise to the zone if the merchandise is not prohibited by law. The interposition by the Bureau in the movement of the goods is a denial of the rights afforded by 19 U.S.C. §81c where the action taken is not consistent with the Foreign Trade Zone Act.

The Customs Regulations provide for the examination of non-privileged foreign merchandise by Customs, but they also provide a time. Unlike merchandise about to be released into United States commerce which must be examined promptly, merchandise destined for the zone is subject to examination in the zone after its arrival. See Customs Regulations, 1943, §30.5(f). As merchandise destined for the zone is not to be entered into United States commerce there is no reason to take the time of inspectors concerned with entry to examine goods not about to be entered.

We have asserted the reasons why we contend that the seizure to which this petition is directed was not authorized by law and should not have taken place. We would also, for the record, make mention of the so-called "alteration" of the application. The application was not prepared by the petitioner's president, but in his behalf by a licensed customs broker. The broker's clerk omitted to enumerate film among the merchandise inside the seized containers, and in fact set down a nominal value for the goods less than

the invoiced value. The papers were presented to Customs as provided in §30.5(d), Customs Regulations of 1943, and the duplicate copy of the application was stamped with a permit and returned. All this happened on a Friday afternoon. There was no time that day to move the goods, but the petitioner's president called the broker to see if the permit had been obtained. The broker stated that it had, and read the permit to him over the telephone. The petitioner's president immediately said that it was incorrect. As a result of this advice the petitioner's president was subsequently informed that he was to correct the permit copy of the application, and that the original at the Customhouse would be corrected also. He did so.

Even assuming that Chapter 1A of Title 19 provided a penalty for submitting corrected documents, the question which would require an answer in assessing the penalty would be the gravity of the injury. We can think of no injury sustained by the Government in this case.

The petitioner, however, has suffered real injury which remains unredressed. Its merchandise, of a purported domestic value of $315,471.93, has been seized and has thus remained for the last three months. Worse, much of the merchandise consists of stainless steel razor blades which are about to lose their market value because of the advent of chromium coated blades. In addition, the merchandise also consists in part of dated film which even now cannot reach the petitioner's customers on time to command the price of fresh merchandise. We think, too, that the Government should not be unmindful of the harm to the conduct of the petitioner's business resulting from the freezing of $315,471.93 of its assets.

Finally, while the Government has tied up a man's business because of an inadvertent clerical error, the importer has sustained an irreparable loss. For the inventory furnished by the Government, even taking the several apparent errors into account, shows that a substantial shor-

tage of goods took place after the containers were unsealed on the pier and while in Customs custody.

It is hoped that the remaining merchandise will be made available for the petitioner's disposition without further delay, and the case cancelled.

HATZLACHH SUPPLY CO., INC.

By /s/ Morris Broker
Morris Broker, President

Counsel: SIEGEL, MANDELL & DAVIDSON
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Joseph S. Kaplan
For Counsel

UNITED STATES COURT OF CLAIMS
No. 120-76
[Caption omitted]

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * * * *

STATEMENT OF FACTS

Plaintiff's Claim arises from the seizures in 1970, by the United States Customs Service of the contents of 3 containers being imported by plaintiff.

These containers were seized on the basis of plaintiff's alleged violation of 19 U.S.C. 1592 based on the claim that plaintiff's invoice documents improperly described the merchandise. This section provides that if there is an attempt thereby to willfully deprive the United States Government of any revenue, then this merchandise shall be *"subject to forfeiture."*

As these seizures are provisional and unilateral acts on the part of authorized agents of Customs prior to a full disposition and determination of the merits thereof, the statutes naturally provide a means of resolution.

19 U.S.C. 1618 provides for an administrative application to the Treasury for remission of the forfeiture based on either lack of cause on the part of Customs or mitigating circumstances on the part of the importer. Pursuant thereto, the Secretary may offer to remit the forfeiture either with or without penalty. If the applicant importer fails to receive an offer from the Secretary or if he is otherwise dissatisfied with such offer he can pursue a full plenary forfeiture proceeding in district court pursuant to 28 U.S.C. Section 2465.

28 U.S.C. 2465 provides that if the importer claimant should prevail then "such property shall be returned forthwith to the claimant."

Plaintiff herein pursued the above described procedures and successfully concluded an agreement with the Treasury

for the remission of the forfeiture in return for the payment of a $40,000 penalty.

Plaintiff complied with the terms of the agreement and paid the $40,000 penalty to the Treasury. Upon return to plaintiff of the containers, it was however found that sizable quantities thereof were missing and had been pilfered in the interim. Plaintiff thus filed suit contending that during the time that the containers were in the possession and custody of Customs various items of merchandise totalling a value of $165,220.50 were stolen.

* * * * *

UNITED STATES COURT OF CLAIMS

HATZLACHH SUPPLY COMPANY, INC.

v.

The UNITED STATES.
No. 120-76

July 14, 1978.
Rehearing and Rehearing En Banc
Denied Sept. 29, 1978.
579 F.2d 617

Before DAVIS, KUNZIG and BENNETT, Judges.

ON DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

KUNZIG, Judge:

This action, involving plaintiff's claim that the Government breached an implied-in-fact contract which allegedly arose from the detention of certain merchandise by United States Customs Service personnel comes before the court on defendant's motion for summary judgment and plaintiff's opposition thereto. Because we essentially agree with the Government's argument concerning the clear congressional intent to retain sovereign immunity with regard to claims arising out of detentions of materials by customs inspectors, we hold that plaintiff's petition does not state a claim upon which relief can be granted and, accordingly, we grant defendant's motion.

Hatzlachh Supply Company (Hatzlachh or plaintiff) alleges that in 1970 it imported certain camera supplies and miscellaneous items from Germany which, upon arrival in port in New Jersey, were seized and declared forfeited by the United States Customs Service (USCS). Plaintiff followed statutory and regulatory procedures in seeking

relief from the forfeiture. *See* 19 U.S.C. § 1618 (1970); 19 C.F.R. § 171.11-13 USCS, in October of 1970, agreed to return the forfeited materials upon payment of a $40,000 penalty. Hatzlachh complied with the terms prescribed by the USCS and paid the $40,000 into the Treasury of the United States. Upon the return of the seized material to plaintiff, it was noted that certain items were inexplicably missing. Hatzlachh brought suit in this court seeking to recover $165,220.50 (plus $2,000,000 for alleged loss of "face and good will . . .") which it alleges was the total value of the goods that were "pilfered" or "stolen" while the forfeited material was in the possession of the defendant.

Defendant now moves for summary judgment on grounds that plaintiff has failed to state a claim within the jurisdiction of this court. Plaintiff's petition set forth two separate causes of action. The first involved an alleged breach of a contract of bailment while the second alleged that the seizures were "capricious, arbitrary, unreasonable, unlawful and not sanctioned nor colored" by law and that they "constituted an unreasonable detainer of plaintiff's property and deprivation without due process."

We agree with the defendant that plaintiff's second cause of action is unsupportable. Plaintiff's own petition to the Regional Commissioner of Customs *admitted* that the merchandise description submitted to the USCS officials was "erroneous" and that the discrepancy between the merchandise description and the items actually landed were "obvious and apparent." Although plaintiff's petition goes on to question the propriety of the USCS's actions against the goods, such "obvious and apparent" deviations from prescribed USCS import procedures certainly would render the USCS's action non-arbitrary and non-capricious, although perhaps of questionable severity.

Even if we should determine that the defendant's actions were so arbitrary and capricious as to be outside the broad statutory and regulatory discretion and authority accorded

the USCS, this portion of plaintiff's second cause of action would then sound in tort, and this court would be without jurisdiction. 28 U.S.C. § 1491 (Supp. V 1975); *Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 192 Ct.Cl. 649 (1970).

The second portion of plaintiff's second cause of action is equally without merit. Defendant's declaring a forfeiture of goods under 19 U.S.C. § 1592 (1970) is hardly comparable to a "taking" for public use without just compensation, which would allow plaintiff to recover pursuant to the Fifth Amendment's ban on such taking. *See, e.g., Huerta v. United States*, 548 F.2d 343, 212 Ct.Cl. 473, *cert. denied*, 434 U.S. 828, 98 S.Ct. 108, 54 L.Ed.2d 88 (1977). Again, plaintiff is faced with the situation where the forfeiture was either declared in accordance with statutory and regulatory guidelines, in which plaintiff *was* accorded the "due process of law" and there was no "taking," or else the action taken was outside statutory and regulatory authority, in which case this court is without jurisdiction because plaintiff's action sounds in tort.

Plaintiff's first cause of action, however, based on the Government's breach of an implied contract of bailment, presents a much more difficult and serious problem. Plaintiff contends that the USCS, in taking custody of the goods, made only a provisional seizure pending full disposition on the merits. Plaintiff further relies upon the language of 28 U.S.C. § 2465 (1970), which states:

> Upon the entry of judgment for the claimant in *any proceeding to condemn or forfeit property seized under any Act of Congress, such property shall be returned forthwith to the claimant* . . . (emphasis supplied in plaintiff's brief)

for the proposition that the Government's allegedly provisional seizure created an implied contract of bailment between Hatzlachh and the United States. Plaintiff's logical conclusion is that, in failing properly to protect and

return some of the material seized, defendant breached this implied contract of bailment.

Plaintiff's argument gains considerable support from the decision of the Second Circuit in *Alliance Assurance Company v. United States*, 252 F.2d 529 (2d Cir. 1958). In that case involving similar circumstances, the court, in a two-part holding, determined that an implied-in-fact contract did exist[1] between the USCS and the importer and that the importer had an alternate cause of action under the Federal Tort Claims Act. The Federal Tort Claims Act assumes significance in *Alliance*, as it does in the case at hand, for two reasons. One is the resemblance which the importer's claim of a breach of contract bears to a claim for a breach of duty in tort. The other reason is that such claims in tort are explicitly barred by 28 U.S.C. § 2680(c) (1970), which excepts from the coverage of the Tort Claims Act:

> Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs . . . .

The *Alliance* court, interestingly, found that the § 2680(c) exclusion did not apply because the merchandise in question had disappeared and goods which had disappeared could not have been subject to "detention" within the meaning of the statute. Even more to the point, however, the court in *Alliance* reasoned that the Government had, by exerting its statutory authority over the goods, implied a promise to return the goods to the importer. Thus, the court determined that plaintiff in *Alliance* had causes of action under both the Tucker Act, 28 U.S.C. § 1491 (Supp. V 1975) and the Tort Claims Act.

[1]Since the claim in *Alliance* was for an amount less than $10,000, the Federal District Court had concurrent jurisdiction with the Court of Claims. 28 U.S.C. § 1346(a)(2) (1970).

The defendant argues that *Alliance* was *wrongly* decided and is, in any event, distinguishable from the case at hand. It contends that the *Alliance* court, in reversing its own district court, incorrectly utilized the "loose, umbrella concepts of bailment law" to broaden drastically the Tucker Act's limited waiver of sovereign immunity. The Government further points out for support this court's "venerable precedent" in *Schmalz v. United States*, 4 Ct.Cl. 142 (1868), where we held that the general law requiring customs inspection did not imply a contract with the Government.[2] Finally, defendant cites the rationale of the district court judge in *Alliance* in arguing that no implied-in-fact contract could exist because there was no mutual assent.

Even if the *Alliance* decision were correct, continues the Government, that case was distinguishable from the one at hand. In *Alliance*, the court was faced with a situation where the goods which subsequently disappeared had merely been detained for inspection pursuant to 19 U.S.C. § 1499, while, in our present case, the goods had actually been seized subject to forfeiture pursuant to 19 U.S.C. § 1592 (1970), because a violation of the customs laws had already been found. The defendant concludes that, since goods seized subject to forfeiture (under § 1592) can be returned only after some judicial discretionary or administrative determination has been made, no implied-in-fact contract could possibly have arisen out of the seizure.

The Government's final contention centers on the important public policy involved in allowing customs officials to go about their work unimpeded by fear of "implied in fact" contract claims each time they must seize or detain some item—and on the related theory that waivers of

[2]Defendant also notes that *Alliance* stands alone in holding the § 2680(c) Tort Claims Act exclusion inapplicable under similar circumstances, *citing United States v. 1500 Cases*, 249 F.2d 382 (7th Cir. 1957); *S. Schonfeld Co., Inc. v. S.S. Akra Tenaron*, 363 F.Supp. 1220 (D.S.C. 1973); *Bambulas v. United States*, 323 F.Supp. 1271 (D.S.D. 1971).

sovereign immunity must be strictly construed. We reach the same result as does the defendant, although for the somewhat different reasons stated below.

Initially, it must be noted that the statutes cited by the plaintiff, along with the action of the USCS in agreeing to return the seized goods upon payment of a $40,000 fine by Hatzlachh, could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods to Hatzlachh. All other things being equal, such a factual and legal combination might enable plaintiff to prevail.

However, we need not now decide this issue because, unfortunately for plaintiff, all other things in the present case are not equal. This court has previously held that there can exist no contract implied-in-fact unless there is an actual meeting of the minds and a mutual intent to be bound. *See, e.g., Somali Development Bank v. United States,* 508 F.2d 817, 822, 205 Ct.Cl. 741, 751 (1974). Plaintiff here would have us *imply* a promise, or intent to be bound, on the part of the Government similar to the promise implied by the Second Circuit in *Alliance:*

> It is at least as reasonable to imply such a promise here as it is to imply a promise by the government to pay for lands it has tortiously appropriated as was done in *United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (alternative holding), and *United States v. Lynah,* 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539.

There are, however, two major obstacles to adopting the rationale of *Alliance.* The first is the obvious factual distinction between the Government's tortious (or non-tortious) seizure of land from the unquestioned, rightful owner [as in *Dickinson*] and the USCS' seizure subject to forfeiture of goods entering the country illegally [as in our present case]. In our view, finding an implied promise to pay in the former set of circumstances certainly would not necessitate finding a similar promise to pay (or return the goods) in the latter.

An even more significant obstacle, however, is encountered in Congress' specific and explicit rejection of any tort liability for "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs." 28 U.S.C. § 2680(c). With this strong, all-inclusive language, the legislative branch of our Government affirmatively recognized the vital importance to the public of unimpeded lawful operations by customs officers and refused to waive sovereign immunity with respect to those functions specified. Notwithstanding the possible interpretation which the *Alliance* court might give to the facts now before us, it appears clear to us that Hatzlachh's claim obviously arose "in respect of . . . the detention of . . . goods or merchandize by [an] . . . officer of customs. . . ."

In a recent decision, this court refused to find an implied-in-fact contract in a situation where Congress had, according to the Supreme Court's interpretation of the Tort Claims Act in *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), restricted a serviceman's recovery for injuries — even those tortiously inflicted — to certain statutorily prescribed procedural and substantive limitations. *Jackson v. United States,* 573 F.2d 1189, 216 Ct.Cl. — (1978). In *Jackson* we cited the Supreme Court's recent decision in *Stencel Aero Eng'r Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), which noted that allowing recovery on an implied-in-fact contract would be to "judicially admit at the back door that which has been legislatively turned away at the front door." 431 U.S. at 673, 97 S.Ct. at 2059. We concluded that "Since a soldier cannot circumvent the compensation system by suing in tort for additional money damages for injuries, there is no logical reason to allow him to circumvent the congressionally mandated limitations in a suit that he characterizes as one for breach of contract, which is the case here." *Jackson, supra,* 573 F.2d at 1199, 216 Ct.Cl. at

———.

The exact rationale we employed in *Jackson* gains added strength in the case at hand. Here, Congress has *specifically*

precluded recovery in claims arising from customs detentions, even where such claims arose from tortious actions by the Government. This being the fact, it would certainly be a trespass on congressional prerogatives for this court now to hold that, by seizing subject to forfeiture certain merchandise, the Government *assented* to, or agreed to be bound by, an implied-in-fact contract to return the merchandise whole. Lacking such assent by one of the parties (and here it is doubtful whether either of the parties actually agreed), we cannot find an implied-in-fact contract. *See, e.g., Somali Development Bank v. United States*, 508 F.2d 817, 205 Ct.Cl. 741 (1974). While we may sympathize with the plaintiff for the loss of such a substantial amount of goods, we cannot judicially allow by the back door a claim which was, rather clearly and explicitly, legislatively barred at the front.

But we do not consider the present decision as necessarily controlling a case in which there were additional facts from which an implied or express agreement could possibly arise, *e.g.*, a promise, representation or statement that the goods would be guarded or carefully handled. It is conceivable to us that, in such circumstances, a claim might lie under the Tucker Act even though 28 U.S.C. § 2680(c) might still preclude recovery under the Tort Claims Act.

For the above-stated reasons, after reading all of the submissions in the light most favorable to the plaintff for purposes of plaintiff's opposition to this motion for summary judgment, we hold that Hatzlachh has failed to state a claim based on an implied-in-fact contract[3] and has, therefore, failed to state a claim for which we can grant relief.

Accordingly, after consideration of all the submissions of the parties, and without oral argument, defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

[3]Plaintiff's other contentions, as outlined and discussed above, we hold to be equally without merit.

UNITED STATES COURT OF CLAIMS

No. 120-76

[Caption omitted]

MOTION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Plaintiff hereby moves this Court pursuant to Rules 151 and 7 for a review en banc of its decision herein dated July 14, 1978.

The aforesaid decision dismissed plaintiff's petition on the purported ground that it did "not state a claim upon which relief can be granted . . ." (see page 1 of Decision)

Plaintiff not having had oral argument respectfully requests of the Court that it be given an opportunity to orally present its case for the Court's review on the grounds that this case is of singular importance and merits review in view of the Court's holding which basically immunizes and peculiarly sets apart one government department *from most other* governmental departments with respect to governmental accountability and responsibility for its misfeasance.

The issues herein represent a substantial federal question with relation to the liability of the Customs Service for its misfeasance. Additionally, this decision places in doubt the uniformity of prior decisions of the court wherein it excepted just postal bailments from governmental responsibility and none other. Despite the court's tenuous distinction of the facts in the instant case from that of the *Alliance* case it really conflicts head on with the *Alliance* ruling of the Second Circuit.

With respect to the decision of the Court herein, it is respectfully submitted that the Court misapprehended the facts and the applicable law.

The Court misapprehended the fact that the undenied payment and receipt of the $40,000 by Customs Service in consideration of its administrative determination to release and return plaintiff's goods (inasmuch as adequacy of consideration is not for the court to decide) created a new contract whether by novation or modification.

Accordingly, assuming arguendo no contract of bailment is created when Customs Service initially seizes goods, a new contract to deliver palintiff's merchandise is undoubtedly created at the time of the payment of the $40,000. This is a contract like all other contracts which bind the government (e.g., a contract by any government agency to deliver goods to a party).

Secondly, the Court (Decision, pages 6 and 7) mistakenly perceived the Tort Claims Act, 28 U.S.C. § 2680 (c) as an obstacle to a tort recovery and thus further mistakenly felt that allowing a contractual recovery would circumvent the legislative perogative.

The fallacy of this argument is exceedingly obvious. Plaintiff will demonstrate it in a two-fold manner.

The stricture against allowing "by the back door a claim which was, rather clearly and explicitly, legislatively barred at the front" is of no moment here as plaintiff's claim is, so to speak, entering another house altogether.

Plaintiff herein possesses a cause of action which existed apart from and prior to the passage of the Tort Claims Act (i.e., the Tucker Act and its predecessor, the Act of February 24, 1855, 10 Stat. 612). Assuming arguendo that (as we shall see further that it is an erroneous assumption) there ever was a limitation in the congressional grant of power to sue the Customs Service in tort, what bearing can this have on plaintiff's exercise of his remedies via a cause of action that existed prior to the passage of the Tort Claims Act. Any limitation in the Tort Claims Act (assuming there is any) can logically only have bearing on rights that flow from that very Act.

To suggest otherwise would be to infer a congressional intent not to limit but rather to repeal heretofore existing causes of actions, that did not even flow from the Tort Claims Act.

Such an inscrutable suggestion not only flies in the face of all logic and classical rules of statutory construction but is not borne out by the most elementary reading of the Tort Claims Act, 28 U.S.C. § 2860.

The statute specifically reads,

> The provisions of *this chapter* and section 1346(b) of this title shall not apply to . . . (emphasis supplied.)
>
> (c) Any claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs . . . (emphasis supplied.)

It clearly reads that only the "provisions of this chapter shall not apply . . . " (emphasis supplied.)

It clearly pertains only to remedies flowing from this chapter (i.e., the Tort Claims Act) and not remedies flowing from the Tucker Act.

To infer a congressional intent to repeal another prior existing right it would have been incumbent upon the draftsmen of the Tort Claims Act to use the language that "no one may sue for any claims arising in respect of the detention of goods by customs" rather than the statutorily extent language of "The provisions of this chapter . . . shall not apply . . . ." It is obviously only this chapter's provisions and not those of the Tucker Act that are referred to therein.

Assuming a tort was also deemed arising from defendant's acts, plaintiff's right to select and pursue its contract remedies is constitutionally inviolate and cannot be vitiated.

A further glance at the statute will additionally belie the possibility of defendant's proferred interpretation of the statute. For subsections (d) and (e) pertain to patent and admiralty claims against the United States for which the Court of Claims has obviously retained jurisdiction and the

government held liable therefore subsequent to the passage of 28 U.S.C. § 2680.

The limitation obviously only refers to the applicability of this chapter's provisions and does not confer any blanket immunity.

The Tort Claims Act was furthermore clearly never intended to bar claims arising from the negligent loss of goods by the Customs Service but rather to the detention of same by the latter. Why is the Customs Service any different than say the Bureau of Prisons with respect to the latter's responsibility for the safeguarding and return of the personal effects and possessions of prisoners committed to its custody.

Is the government immune from liability when someone is injured in a collision with a government paddy wagon driven negligently by a U.S. Marshall. Is anyone suggesting that the spectre of such liability would impede the zeal of the government in incarcerating those prisoners committed to its custody.

It is about as appropos as to suggest that the imposition of liability for negligence in driving a Washington Post delivery truck would have a "chilling effect" on the constitution's First Amendment.

Plaintiff here is conceding the lack of merit to its claim for $2,000,000 for loss of business, good will, etc. due to the improper seizure. Neither is it suggesting that the government might be liable in the case of an improper seizure for the deterioration and spoilage of goods due to the time span of the government custody. The foregoing might conceivably relate to the exercise of discretionary functions and could arguably impede the same.

Plaintiff herein, however, will insist on compensation for the value of the very goods lost by the Customs Service. Is the Customs Service not up to the task of securing goods of others in its custody? Is the Court's decision a signal to the Customs Service for the abdication of its responsibilities? Does the Customs Service have the arrogant and un-

trammeled right of taking a cavalier attitude with respect to the custody of other peoples' previous and valuable goods. The Court's decision seems to imply such.

Cold logic can only sustain the *Alliance* Court's interpretation of the limitation set forth in the Tucker Act as pertaining only to claims arising from detention of goods as opposed to the negligent loss of goods.

As the *Alliance* Court said at 252 F2d 534,

> The probable purpose of the exception was to prohibit actions for conversion arising from a denial by the customs authorities or other law enforcement agencies of another's immediate right of dominion or control over goods in the possession of the authorities . . . (emphasis supplied.)

Stated succinctly, one is relegated by this limitation to travel the traditional mandamus route in seeking the return of goods held unreasonably by the Customs Service and cannot sue for conversion under the Tort Claims Act.

The correctness of this interpretation is further inescapably demonstrated by the *Alliance* Court at 252 F.2d 534 in finding that,

> That the exception does not and was not intended to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities is best illustrated by the fact that the exception immediately preceding it expressly bars actions "arising out of the loss, miscarriage or negligent transmission" of mail, 28 U.S.C. § 2680(b). If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U.S.C. § 2680(b) shows that it would have been equal to the task.

In other words, the Tort Claims Act's exception in 28 U.S.C. § 2680(c) could equally have been phrased in terms

of "any claim arising in respect of . . . negligent loss or destruction of any goods . . .".

Accordingly, the *Alliance* Court at 252 F.2d 534 concludes,

> The conclusion is inescapable that it did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others.

A careful scrutiny of the limited legislative history on point further vindicates the Alliance Court's conclusions in that the limitation of 28 U.S.C. § 2680(c) was specifically intended to deprive one of suits in conversion where mandamus is equally available.

Report No. 1287 of the House of Representatives, 79th Congress, 1st Session, entitled "Tort Claims Against The United States" (page 2) indicates that the obvious intent of the statute was to deprive the government of immunity.

> As a result . . . the Government is subject to suit in contract, on admiralty and maritime torts and for patent infringement. On the other hand, no action may be maintained against the government in respect to any common law tort. *The existing exemption in respect to common law tort appears incongrous. Its only justification seems to be historical* . . . (emphasis supplied.)

The House Report (at page 6) actually reveals that some of the exceptions in the statute were not intended by the draftsmen to buttress sovereign immunity but relegate claimants to traditional remedies.

> The other exemptions in section 402 relate to certain governmental activities which should be free from the threat of damage suits *or for which adequate remedies are already available* (emphasis supplied.)

As already indicated, there being no sound reason why the Customs Service should be absolved for all ministerial

misfeasance (especially as plaintiff's claim is being limited to the value of the goods directly lost by the Customs Service) the latter explanation in the House Report, *supra* is the key.

In the case of detention of goods the draftsmen were precluding a remedy sounding in conversion as "adequate remedies are already available", i.e., mandamus.

The blanket exemptions in the case of the loss of mail by the Postal Service and the class of wilful torts were only intended to leave unimpeded the *discretionary activities* of government officials.

As the Report (*supra*) at page 6 states,

> The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion. Nor is it desirable or intended that the constitutionality of legislation, or the *legality of a rule or regulation should be tested* through the medium of a damage suit for tort (emphasis supplied.)

The foregoing basically conforms to the Senate Report No. 1400, 79th Cong., 2d Session, which also indicates that it is not intended that all the enumerated categories be granted blanket immunity but that multiplicity of remedies be avoided in cases for which adequate remedies are already available.

Accordingly, the conclusion must be sustained that the Tort Claims Act allows a tort cause of action against customs to be founded upon it and in any event certainly does not repeal a cause of action in contract founded on a prior act.

The last matter that plaintiff addresses itself to is the Court's tenuous and erroneous distinction between "the Government's . . . seizure of land from the rightful owner [as in Dickinson] and the U.S.C.'s seizure subject to for-

feiture of goods entering the country illegally as in our present case." (Decision, page 6)

The suggestion that an *ex parte* decision by the Customs Service officials to seize goods for an alleged violation (plaintiff is not conceding the violation which is academic, in any event) can strip plaintiff of his ownership and title to the goods, is beyond all bounds of established law, reason and equity.

It is akin to saying that the family of one arrested for murder has no wrongful death remedy for medical malpractice occurring in a prison infirmary because a police officer's arrest constitutes a tribunal finding and judicial disposition and death warrant.

It cannot be overstated that a naked seizure is not a disposition on the merits (nor a disposition at all).

And as plaintiff was the rightful owner of the subject goods, that presumption of ownership continued until there was a judicial or quasi judicial fact-finding to the contrary. As the Customs Service came to an agreement with plaintiff for release of the seizure, that judicial fact finding disposition was never had. As such a judicial disposition never came to pass, the presumption of plaintiff's ownership and title to the goods never ceased and continues to date.

Consequently, the Court's proferred distinction between the situation herein and that of *Alliance* and *Dickinson* is thus vitiated.

As a matter of fact the following cited quotation from the Treasury Department's own rules T.D. 77-148 (Federal Register 5/31/77) will conclusively (though gratuitously) show that a Customs Service seizure does not effect title or ownership but is rather a security device for the sole benefit of the Customs Service.

T.D. 77-148 reads

> Treasury Decision 77-136 amended § 162.41(a) of Customs Regulations (19 CFR 162.41(a)) to provide for certain situations in which merchandise shall, or shall not, be seized. *§ 162.41(a)(3) was amended to provide that merchandise shall only be seized* if the District Director is satisfied that (1) the *violator appears to be insolvent* or may soon become insolvent, (2) the violator or his assets appear to be beyond the jurisdiction of the United States or (3) for some other reasons a claim for the domestic value of the merchandise would not protect the revenue (emphasis supplied.)

The aforesaid Treasury Department Decisions limiting the Customs Service's seizure perogatives to those situations that give rise to insecurity is a clear and convincing mandate of government and statutory intent that a seizure has no effect on ownership but merely affords the Customs Service with financial security pending full disposition of the alleged violation.

Accordingly, the relevant facts herein are precisely like those of *Alliance* and *Dickinson*.

Accordingly, as plaintiff is conceding that lack of merit on the $2,000,000 claim due to the arbitrariness of the seizure, and neither is it seeking damages for any kind of spoilage and deterioration of the goods during the Customs Service custody, but is merely seeking the actual value of the goods directly lost by the Customs Service, no spectre of an impediment to the untrammeled exercise of the Custom Service's discretion can be suggested. In no way does this claim differ from that of *Alliance*.

Additionally, it is respectfully submitted that the opening statement in defendant's brief that plaintiff's goods were seized for "violation" of Customs Service laws and for attemption "to introduce into the commerce of the United States merchandise by means of false statements" without qualification as an "alleged violation" can only be perceived as an *ad hominem* attack on plaintiff designed to obscure the real culpability of the Customs Service in the high handedness of its seizure and its misfeasance in securing plaintiff's goods.

As academic as it may seem, the facts herein involved a mere clerical error by a custom's broker regarding goods that were only being brought into the Foreign Trade Zone and were not intended to be "introduced into the commerce of the United States", an error which could not have effected a deprivation of tariff revenue (as there were none owing).

Of course, *ad hominem* arguments have no place in proper legal discourse especially when they are as irrelevant as herein.

What is of significant moment is that crediting any of defendant's arguments would in effect entail that Customs "can do no wrong".

It would in effect signal the Customs Service to go on leaving goods open and unsecured on the docks without accountability. It would leave legitimate claimants totally without remedy or legal recourse. It would be a regression to feudal justice not in keeping with enlightened and modern notions of government.

Accordingly, for the foregoing reasons the Court is respectfully urged to allow for oral argument and consider a rehearing of its decision with a view towards denying defendant's motion for summary judgment.

Respectfully submitted,

MARK LANDESMAN
Attorney for Plaintiff.

UNITED STATES COURT OF CLAIMS

No. 120-76

[Caption omitted]

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR REHEARING

Defendant agrees with plaintiff's statement that this Court's decision "conflicts head on with the *Alliance* ruling of the Second Circuit." (P. Reh. Br., p. 1.) As defendant pointed out in its briefs, however, the *Alliance* decision was clearly erroneous.

Plaintiff's argument (*Id.* p. 2) that a "new"contract to deliver the merchandise was created at the time of payment of the $40,000 fine was presented to the Court (in a half-hearted way) on page 29 of its brief filed February 21, 1978. While defendant deemed the argument then "so devoid of merit as to be unworthy of a response" (Deft's Reply Br., filed March 31, 1978 at p. 18), the Court did indicate (Slip Op., p. 5) that "all other things being equal," plaintiff could make a strong case for recovery on such theory. Defendant disagrees. In any event, the Court found (Slip Op., p. 6) that "all other things in the present case are not equal," since the required elements of an actual meeting of the minds and mutual intent to be bound were lacking. This is correct.

Plaintiff would reject the Court's argument that to allow recovery on a contract theory when Congress expressly retained sovereign immunity to such claims by enacting 28 U.S.C. § 2080(c) would be to permit access by the back door despite the fact that the front door had been locked by Congress. Plaintiff states that he is trying to enter "another house altogether" (P. Reh. Br., p. 2). Plaintiff is wrong. It is still trying to get into the Treasury, by whatever theory it can. The "back door" argument is a valid means of interpreting the intent of Congress as to whether sovereign

immunity has been waived, as recognized by the Supreme Court in *Stencel Aero Eng'r Corp.* v. *United States*, 431 U.S. 666 (1977) and by this Court in *Jackson* v. *United States*, 216 Ct. Cl. ____, 573 F.2d 1189 (1978), both of which were relied upon by the Court in its decision in the instant case. Plaintiff has shown no basis to overturn the Court's reliance on the *Stencel Aero* rationale.

Plaintiff's arguments based on *Alliance* (Reh. Br., pp. 6-9) were fully considered and rejected by the Court. They appear no stronger as reformulated by plaintiff now. The only new material is the quotation from the House Report No. 1287 on the Tort Claims Act. The languge from page 6 of the Report quoted by plaintiff supports defendant:

> *The other exemptions in Section 402 relate to certain governmental activities which should be free from the threat of damage suits* or for which adequate remedies are already available.
>
> (Emphasis added.)

Plaintiff emphasized the last clause, but the portion [italicized] above is stated in the disjunctive and fully supports the following statement at page 22 of the Government's moving brief herein:

> Unless a remedy in tort has been provided, it is essential to the proper implementaton of the police powers of the sovereign that the Customs be free from suits seeking damages for implementation of the laws regarding seizures and forfeitures.

The basic flaw in plaintiff's argument that the "detention" exception to the Tort Claims Act was not intended to "repeal a cause of action in contract founded on a prior act" [*i.e.*, the Tucker Act] is that the Tucker Act never did authorize suit on contract implied in law, *Merritt* v. *United States*, 267 U.S. 338 (1925), as this sort of "implied bailment contract" most surely is.

Plaintiff complains (P. Reh. Br., pp. 10-12) about the Court's distinguishing *United States v. Dickinson*, 331 U.S. 745 (1945), on the grounds that while an "implied contract" might be inferred under the *Dickinson* facts one would not necessarily be inferred where the property entered the county illegally, "as in our present case." (Slip Op., p. 6.) Plaintiff correctly points out (P. Reh. Br., p. 10-11) that there has never been a *judicial* determination that its goods were properly subject to forfeiture (plaintiff mooted he issue by paying a fine and having the forfeiture remitted). Nevertheless the Court's rejection of the Second Circuit's analysis of *Dickinson* was correct since, as defendant pointed out in its prior briefs, the Supreme Court's later decisions such as *United States* v. *Causby*, 328 U.S. 256 (1946), cast doubt on the "implied contract" rationale of some early "taking" cases. In any event, the United States never "took" any property in the instant case — it was stolen by persons unknown — so the *Dickinson* "implied contract" ratonale is not for application even if it were correct, which it is not. Therefore, while the Court may have distinguished *Dickinson* for the wrong reason, it correctly concluded that *Alliance* was wrong in finding a contract implied in fact to protect or pay for goods lost or stolen while under detention by Customs.

Plaintiff's final argument, that defendant made an *ad hominem* attack on plaintiff, is without merit. Defendant has always made it clear that plaintiff was determined *by Customs* to have violated the customs laws, which is undeniably true. Moreover, in the interest of fairness and completeness, defendant attached as exhibits to its moving brief the self-serving letters from plaintiff to Customs defending against the charge of violation of such laws. It is therefore emphatically denied that defendant made any improper *ad hominem* arguments at all, much less any improper arguments which would justify rehearing.

CONCLUSION

For the foregoing reasons, plaintiff's arguments in support of its motion for rehearing have either already been

fully considered and properly rejected by the Court in its initial decision or are utterly devoid of merit. Accordingly, the motion for rehearing should be denied.

Respectfully submitted,

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